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Title Assurance In Sales Of California Residential Realty: A Critique Of Title Insurance And Title Covenants With Suggested Reforms

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Typically, a Californian who purchases residential real estate does so in the naive belief that the customary methods of handling such transactions provide him with the optimum in assurance that he will obtain the title for which he bargained. Although in most instances the buyer succeeds in securing good title, it is submitted that the traditional real estate practices in California do not justify this expectation. From the negotiation of the purchase to its closing, the usual purchaser of residential property is seldom represented by counsel, and instead relies upon the skill of a real estate salesman selected by the seller. The buyer almost never obtains an independent examination of the title to the land he is purchasing since he has been induced by longstanding custom to place his faith in a title insurance policy containing numerous exceptions which he infrequently reads and seldom understands. Further, the typical purchaser does not receive the benefit of any covenants of title from his seller apart from the limited covenants implied in a California grant deed.[1]

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1. The "statutory grant deed" in California is a deed in which the word "grant" is used as the equivalent of certain title covenants authorized by Civil Code Section 1113. See text accompanying notes 119-122 *infra*.

It is appropriate in this time of "consumerism" for California to re-examine this state of affairs to determine whether current practice provides buyers with sufficient assurance of their title and, if not, whether reform can be achieved. This article reviews the current California practice and suggests reforms designed to strengthen the purchaser's means of title assurance. This article first examines several aspects of the California standard title policy[2] and suggests changes in the law which relates to them. The article then compares the California statutory grant deed with the common law methods of title assurance and contends that the latter should be statutorily revived in this state. These suggested reforms are embodied in a proposed legislative package, found at the conclusion of this article.

TITLE INSURANCE AS A METHOD OF TITLE ASSURANCE

A. General Liability of the Insurer

The standard title insurance policy generally insures only against defects of record which are not excepted from coverage in the policy. This standard policy also insures the marketability of the title.[3] Because in most instances the policy only covers defects of record, the liability of the title insurer may often turn upon technical rules as to what constitutes record notice. Illustrative of the limited exposure of the insurer is *Bothin v. California Title Insurance & Trust Co.*,[4] where the policy insured the title to two adjacent lots. After the purchase it was discovered that the purchaser's property lines, as well as those of his neighbors, had been mislocated by fourteen feet, apparently due to a surveyor's error. Unaware of the error, the insured's neighbor to the west had encroached upon the insured's property fourteen feet while the insured's own predecessors had encroached fourteen feet upon land to the east of the insured parcels.[5] Sometime prior to the issuance of the policy, the neighbor on the west had conveyed to trustees the fourteen foot strip of

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2. CALIFORNIA LAND TITLE ASSOCIATION, Policy of Title Insurance (1973), (copy on file at the *Pacific Law Journal*) [hereinafter referred to and cited as CLTA Standard Policy]. This policy is the standard policy used by California title insurance companies.

3. "Marketable title" has been defined as one

> free from reasonable doubt and such that a reasonably prudent person, with full knowledge of the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept. It must be so far free from defects as to enable the holder, not only to retain the land, but possess it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value.

Mertens v. Berendsen, 213 Cal. 111, 113, 1 P.2d 440, 441 (1931), *quoting* Kenefick v. Schumaker, 64 Ind. App. 552, 563, 116 N.E. 319, 323 (1917).

4. 153 Cal. 718, 96 P. 500 (1908).

5. *Id.* at 720, 96 P. at 501.

the western portion of the insured's lots. This neighbor, Partridge, successfully maintained an action to quiet his title to this strip by reason of his adverse possession thereof.[6] Subsequently, the insured brought suit on the title policy for the depreciation in the value of his lot and for his expenses in defending Partridge's suit, contending that the earlier deed of trust from Partridge constituted a defect within his policy provisions.[7] Concluding that it was "quite clear from the conditions [of the policy] that what was insured by the [insurer] was that the record title to the lot was in [the insured],"[8] the court rejected the insured's claim by finding that Partridge's deed was not connected with the plaintiff's chain of title.[9] In searching the record title, the insurer at most was obligated to search the title back from the insured's grantor and then adverse each grantor in the chain. However, in so doing, the insurer would not have discovered any conveyances from Partridge, whose title was never incorporated into the record since it was founded upon adverse possession.[10]

Fortunately, the current California Standard Policy does not contain a blanket exclusion of all unrecorded defects. Nevertheless, many of its provisions relieve the insurer of liability for off-record defects.[11] One such provision, for example, excludes liability for "[e]asements, liens or encumbrances, or claims thereof, which are not shown by the public records."[12] It has been held that a recorded lease may also be outside the chain of title, and thus may not be a defect covered by the standard policy provision excluding the rights of possessors not shown by the public records.[13] Likewise, a title insurer is not responsible for defects

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6. *Id.* at 720-21, 96 P. at 501.
7. *Id.* at 721, 96 P. at 502.
8. *Id.* at 721-22, 96 P. at 502.
9. *Id.* at 722-23, 96 P. at 502.
10. *Id.* at 722, 96 P. at 502.
11. The term "off-record" here refers to any matter which is not a matter of public record, either because it has never been presented for recordation or, if so presented, is improperly recorded or outside the chain of title. An off-record defect is thus one of which an individual has no constructive notice under a recording statute. The CLTA Standard Policy contains, *inter alia*, the following exclusions:

> Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.

CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶2.

> Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or other facts which a correct survey would disclose, and which are not shown by the public records.

CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶4.

> Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records.

CLTA Standard Policy, *supra* note 2, Schedule B, pt. 1, ¶8.

> Defects, liens, encumbrances, adverse claims, or other matters . . . not shown by the public records . . . but known to the insured.

CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶9.

12. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶3.
13. Diel v. Security Title Ins. Co., 142 Cal. App. 2d 808, 298 P.2d 873 (1956)

discoverable in recorded plats which are not recorded so as to impart constructive notice.[14]

It may be somewhat unrealistic to limit the title insurer's liability to losses attributable to matters discoverable within the official chain of title. Although the official land records in California are indexed under a grantor-grantee index system, over the years the title companies have constructed title plants of their own which are indexed by reference to parcels rather than to parties. These tract indices classify records in relation to the location of the property, which may make it possible for a title insurer to discover defects which could not be discovered by the sole use of the grantor-grantee index. For example, in a situation like that in *Bothin*, it may have been possible to discover the off-record deed of trust in the insurer's files.

Unfortunately, no California case has held an insurer responsible for matters discoverable in the tract indices. Perhaps the failure of the insurer to take exception to matters not in the official chain but nonetheless discoverable in its own records should be viewed as a tortious failure to inform the insured of the true state of his title rather than as an insured risk. Since there is a suggestion to several recent cases that title insurers may be held liable for negligent misrepresentations of the state of a title,[15] it would seem equally appropriate to regard the insurer's records as part of the "record" for purposes of determining its liability upon a title policy. Constructive notice of matters discoverable through the insurer's tract index should be imputed to the insurance carrier, and it should be estopped to assert that such matters are outside the grantor-grantee chain. Although no statistical data is available from which to determine the frequency of insurers issuing policies which do not except off-record matters that are constructively known to the company, fundamental fairness would seem to require insurers to indemnify insureds who incur losses because of defects known to the insurer which are not brought to the attention of the policyholder. There is no justification for limiting an insurer's liability to matters discoverable in the official records where it does not wholly rely on such records itself; to hold otherwise merely excuses title companies from their own neglect. In the

(distributees of a former owner's estate leased land by written instrument recorded before recordation of a decree of distribution).

14. Stearns v. Title Ins. & Trust Co., 18 Cal. App. 3d 162, 95 Cal. Rptr. 682 (1971).

15. Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 938-39, 122 Cal. Rptr. 470, 485 (1975); Banville v. Schmidt, 37 Cal. App. 3d 92, 105-06, 112 Cal. Rptr. 126, 134-35 (1974); Hawkins v. Oakland Title & Guar. Co., 165 Cal. App. 2d 116, 125-26, 331 P.2d 742, 747-48 (1958); J.H. Trisdale, Inc. v. Shasta County Title Co., 146 Cal. App. 2d 831, 838-39, 304 P.2d 832, 836 (1956). See text accompanying notes 101-118 *infra*.

concluding section of this article,[16] a proposal for statutory reform may be found.

Despite the numerous exclusions in the standard title policy, there are several types of off-record matters which *are* covered by the standard policy. Although the function of the recording act is to protect the expectations of bona fide purchasers for value who rely upon the records, these expectations are sometimes frustrated. Recordation does not validate forged instruments,[17] instruments obtained by fraud,[18] or instruments which have not been delivered.[19] Nor does it protect the purchaser from recorded instruments executed by those who lack capacity,[20] or from claims which are apparent from an inspection of the premises.[21] Likewise, a purchaser cannot rely upon recorded documents which have been improperly altered.[22] Further, titles founded upon void judgments or decrees are not perfected by recordation of the judgments or decrees,[23] and claims based upon mechanics' liens or adverse possession may take precedence over those of subsequent purchasers relying on the record.[24] Obviously, it is difficult for title insurers to insure against claims which are enforceable although not discoverable of record. Nevertheless, California title companies customarily accept the risk of several of these claims in the standard title policy. The standard policy does not except to claims founded upon losses due to reliance upon forgeries, false impersonations, incapacity, or a transfer by a person whose name is different than that of the record owner. This practice has caused one commentator to conclude that the standard policy insures not only the title as shown by the public record, but also the validity of all records within the chain of title.[25] Nevertheless, in one reported case, a title insurer sought to avoid liability where a forgery had been recorded. In *Coast Mutual Building-Loan Association v. Security Title Insurance & Guarantee Co.*,[26] an enterprising fellow forged a deed which purported

16. See statutory proposal following note 153 *infra*.
17. Hopkins v. Fresno County Abstract Co., 36 Cal. App. 699, 173 P. 106 (1918).
18. Deputy v. Stapleford, 19 Cal. 302 (1861).
19. *E.g.*, Cox v. Schnerr, 172 Cal. 371, 156 P. 509 (1916); Black v. Sharkey, 104 Cal. 279, 37 P. 939 (1894).
20. *See, e.g.*, Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794 (1929); Gibson v. Westoby, 115 Cal. App. 2d 273, 251 P.2d 1003 (1953).
21. *See, e.g.*, J.R. Garrett Co. v. States, 3 Cal. 2d 379, 44 P.2d 538 (1935); Taber v. Beske, 182 Cal. 214, 187 P. 746 (1920); Manig v. Bachman, 127 Cal. App. 2d 216, 273 P.2d 596 (1954).
22. Vaca Valley & C.L.R.R. v. Mansfield, 84 Cal. 560, 24 P. 145 (1890).
23. Parsons v. Weis, 144 Cal. 410, 77 P. 1007 (1904).
24. Bothin v. Calif. Title Ins. & Trust Co., 153 Cal. 718, 96 P. 500 (1908) (adverse possession); A.A. Baxer Corp. v. Home Owners and Lenders, 7 Cal. App. 3d 725, 86 Cal. Rptr. 854 (1970) (mechanics' liens). Of course, there are other types of claims which are not subordinated to recorded claims. *See* Chapland, *Record Title to Land*, 6 HARV. L. REV. 302 (1893).
25. Comment, *Title Insurance in California*, 39 CAL. L. REV. 235, 239 (1951).
26. 14 Cal. App. 2d 225, 57 P.2d 1392 (1936).

to convey title to a fictitious person and then, using the name of his fictitious grantee, secured a loan by giving the lender a deed of trust which he executed in the name of the non-existent grantee. Thereafter, the forged deed and fictitious deed of trust were recorded.[27] The lender secured title insurance and, when the true owner subsequently quieted her title, sued on the policy. The insurer defended on the ground that the chain of events appeared proper on the face of the public record so that when the policy was issued the true owner did not appear as the record owner.[28] The court, however, ruled that a policy insuring title as "shown by the public record" should not be construed to mean that the true owner had no title of record where a forged deed purporting to convey his estate had been recorded.[29] Admittedly, the title of the true owner was clouded by the forgery, but she nonetheless had the legal title of record:

> If [the true owner] had conveyed the land, with the forged deed of record, her grantee would have taken good title—clouded, but not inadequate or defective. So it cannot be said in a true sense, or without reliance upon technical niceties of construction, that the rights and claims of [the true owner] were not shown of record when the policy was written. Furthermore, defendant was insuring the title, not merely certifying to the apparent state of the title.[30]

Although the court conceded that the defendant could have specifically provided in its policy that it assumed no liability for losses occasioned by reliance upon forgeries,[31] California title companies have not made general use of such policy provisions.

Even though title companies generally guarantee the validity of the recorded instruments, they do not insure against other off-record claims. As has been mentioned, a grantee takes his title subject not only to matters of record but also subject to any matters which could be discovered by a careful inspection of the property.[32] In addition, he has constructive notice of matters which could be ascertained upon inquiry of the occupants of the property.[33] No similar duties of inspection or inquiry are assumed by title companies under the standard policy. Indeed, the standard policy excludes "[a]ny facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons

27. *Id.* at 228, 57 P.2d at 1393.
28. *Id.* at 229, 57 P.2d at 1393.
29. *Id.* at 230, 57 P.2d at 1394.
30. *Id.* at 230, 57 P.2d at 1394.
31. *Id.* at 231-32, 57 P.2d at 1394-95.
32. See note 21 and text accompanying *supra.*
33. Taber v. Beske, 182 Cal. 214, 187 P. 746 (1920).

in possession thereof."[34] In light of this unwillingness on the part of title companies to undertake a physical examination of the property, the insured under such a policy has no insurance against easements, encroachments, the rights of lessees in possession, boundary discrepancies, and similar matters discoverable upon inquiry unless they are also discoverable in the public record.

Other exclusions in the standard policy include off-record matters known to the insured but which are not known or communicated to the company,[35] defects created or suffered by the insured,[36] taxes and assessments not shown of record,[37] mining claims, reservations in patents, water rights, and governmental use regulations.[38] The standard policy also excludes easements or other interests appurtenant to the insured estate.[39] For example, where land does not abut the system of public roads, a grantee usually does not insure his title to a private right-of-way across adjoining land for ingress and egress, even where the private way is a matter of record. It is possible through negotiation with the insurer to obtain insurance of such appurtenant interests, but the typical insured purchases title insurance without the benefit of counsel and may seldom consider requesting such coverage. Also excluded from standard coverage are boundary disputes under a policy provision excluding "[d]iscrepancies, conflicts in boundary lines, shortages in area, encroachments, or any other facts which a correct survey would disclose" unless such matters are shown in the public records.[40] It is to be hoped that this policy provision will be construed by the courts to be limited to minor discrepancies so as not to exclude any discrepancies which would deny the grantee in any substantial way title to the area for which he bargained.

However, it is possible in some locales to obtain coverage against such claims by securing an extended coverage policy.[41] The cost of this

34. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶2.
35. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶9(b).
36. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶9(a).
37. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶1.
38. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶5, ¶7.
39. Any right, title, interest, estate or easement in land beyond the lines of the area specifically described or referred to in Schedule A, or in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing in this paragraph shall modify or limit the extent to which the ordinary right of an abutting owner for access to a physically open street or highway is insured by this policy.

CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶6. For an example of the judiciary's dislike of this exclusion, see note 54 *infra*.

40. CLTA Standard Policy, *supra* note 2, Schedule B, pt. I, ¶4.
41. The only significant exclusions in an extended policy, normally referred to as an "ALTA Policy" (American Land Title Association Policy) (1970) are:

Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records.

Defects, liens, encumbrances, adverse claims, and other matters (a) created,

coverage is higher than that of standard coverage, and title companies seldom inform their customers of the availability of additional protection.[42] Lenders, on the other hand, frequently require extended coverage under a mortgagee policy. Where extended coverage is purchased, it may sometimes be necessary for the insured to retain a surveyor to survey the parcel before the policy will be written. From the point of view of the purchaser of title insurance, it would seem desirable to require title companies to advise purchasers of the availability of extended coverage, for under such coverage the only significant exclusions are usually defects created or suffered by the insured and off-record defects known to the insured and unknown to the company.[43] Federal legislation has recently been enacted requiring mortgagees to make full disclosure to borrowers of the finance charges involved in the loan and compelling sellers to reveal to buyers of residential real estate certain facts about the sellers' relation to the property.[44] It would seem to be only a natural extension to require title insurers to inform their customers of the availability of extended coverage and of the comparative advantages of such coverage over standard coverage. A proposed statute requiring this disclosure by insurers may be found at the conclusion of this article.[45]

Thus, while most insureds believe that they are insured against all risks, that belief is rarely justified. It is clear that unless extended coverage is obtained, the insured acquires protection under a title policy, with some exceptions, only against defects which are of record and which the company fails to exclude. Of some solace to insureds, however, is the attitude of the courts in construing title insurance policies.

B. Construction of Title Policies

The traditional rules governing the interpretation of insurance policies generally are applied to the construction of title policies. Acccordingly, ambiguities in the policy are resolved in favor of the insured.[46] In *E. A.*

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suffered, assumed, or agreed to by the insured claimant [or] (b) not known to the Company and not shown by the public records but known to the insured claimant . . . .

Any law, ordinance or governmental regulation . . . restricting or regulating or prohibiting the occupancy, use or enjoyment of the land . . . .

AMERICAN LAND TITLE ASSOCIATION POLICY, Policy of Title Insurance, (1970) (copy on file at the *Pacific Law Journal*). The author understands that a few California title companies are offering extended mortgagor's coverage to home purchasers at the same cost as standard coverage. However, it does not appear that this practice has gained widespread acceptance throughout the state.

42. This conclusion is based upon the author's conversations with several real estate brokers in Northern California.

43. See note 41 *supra.*

44. 12 U.S.C.A. §2601 *et seq.* (Supp. I, 1975) (Real Estate Settlement Procedures Act); 15 U.S.C. §1601 *et seq.* (1970) (Truth in Lending Act).

45. See statutory proposal following note 154 *infra.*

46. *E.g.*, Paramount Properties Co. v. Transamerica Title Ins. Co., 1 Cal. 3d 562,

Robey & Co. v. City Title Insurance Co.,[47] this rule was invoked to hold an insurer liable for a title defect. In that case, there had been a dedication of the fee in a portion of the parcel covered by the policy. Aware that this dedication had been the subject of earlier litigation, the company excepted in the policy to the "[r]ights of the public or the right of the owners of lots in the 'Austin Tract,' to use [the portion in question] as a beach and athletic field."[48] Noting that the policy stated that title was vested in the insured, the court found the quoted language ambiguous when read together with the whole policy and concluded that the exclusion referred only to easements.[49] In fact, in the court's opinion, the dedication did not merely create an easement—it transferred the fee.[50]

Similarly, ambiguities in the description of the property in the policy are resolved against the insurer.[51] Also, in construing the standard exception to defects "created" by the insured,[52] it has been suggested by one court that the term "created" refers to a conscious, deliberate causation by the insured, and not to a merely inadvertent one.[53] Furthermore, the courts imply that where a title is insured, ancillary titles and privileges attached to the land may also be covered by necessary implication.[54] Hence, it would appear that any blanket exclusions which are inconsistent with the coverage apparent on the face of the policy are of no effect.[55]

Despite the tendency of the courts to interpret policies strictly against the insurer, in one rather well known opinion the California Supreme Court refused to find any ambiguity in a policy provision insuring the

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569, 463 P.2d 746, 750, 83 Cal. Rptr. 394, 398 (1970); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 269 & n.3, 419 P.2d 168, 171 & n.3, 54 Cal. Rptr. 104, 107 & n.3 (1966). *See generally* 44 C.J.S. *Insurance* §297c (1945).

47. 261 Cal. App. 2d 517, 68 Cal. Rptr. 38 (1968).

48. *Id.* at 521, 68 Cal. Rptr. at 41.

49. *Id.* at 522, 68 Cal. Rptr. at 42.

50. *Id.*

51. *See* Coast Mut. Bldg.-Loan Ass'n v. Sec. Title Ins. & Guar. Co., 14 Cal. App. 2d 225, 229, 57 P.2d 1392, 1393-94 (1936).

52. CLTA Standard Policy, *supra* note 2, Schedule B, pt. 1, ¶9(a).

53. Hansen v. W. Title Ins. Co., 220 Cal. App. 2d 531, 535-36, 33 Cal. Rptr. 668, 671 (1963). The *Hansen* court also indicated that it was "inclined to make an outright restriction of the word 'created', as used in the policy, to an intentional doing by the insured." *Id.*

54. Murray v. Title Ins. & Trust Co., 250 Cal. App. 2d 248, 58 Cal. Rptr. 273 (1967). In *Murray*, the court summarily dismissed the insurer's assertion of policy exclusions inconsistent with the protection on the face of the policy:

> We are not impressed with this defense, and we have no hesitancy in finding the title company's blanket exclusions from the coverage of its policy wholly inconsistent with the protection which the face of the policy purports to offer . . . . When a title company insures an owner's title to property, by implication it likewise insures the presumed ancillary titles and privileges. . . .

Id. at 251-52, 58 Cal. Rptr. at 276.

55. *See id.*

marketability of title, even though the insured was precluded from developing the property. In *Hocking v. Title Insurance & Trust Co.*,[56] the insured was unable to obtain required building permits because a subdivision developer had not executed an agreement or posted bonds for the grading and paving of streets in the subdivision in which the insured parcel was located. Although the county recorder had accepted a subdivision map showing streets within the subdivision, a local ordinance precluded development until the agreement and bonds were forthcoming.[57] The court reasoned that the recordation of this map operated to give the insured title to the land and that it was merely the condition of the land, not the state of the title, which rendered the property unmarketable.[58] Thus, the court found a distinction between the marketability of title and the marketability of the land itself, and therefore strictly interpreted only the portion of the policy relating to title. As the court noted, "[o]ne can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable."[59] This result obtained in spite of the fact that the policy description referred to a plat which showed the streets, and over the dissent of Justice Carter, who argued that the insured "guaranteed also the title to at least a private easement in the streets."[60] It is submitted that the average purchaser of a title policy would not be impressed with the subtle distinction drawn by the majority of the court and that indeed the policy contained an ambiguity which should have been resolved in favor of the insured. The concluding section of this article contains a suggested statutory resolution of this problem.[61]

C. Assignment of Title Policies

According to the standard policy provisions, the liability of a title insurer extends only to the insured and those who succeed to the insured's interest by operation of law.[62] Thus, unlike several common law title covenants,[63] title insurance may not run with the land so as to benefit grantees of the insured. As a result, it is the current practice for each purchaser to secure a new title policy, and there are no reported

56. 37 Cal. 2d 644, 234 P.2d 625 (1951).
57. *Id.* at 646-47 & n.2, 234 P.2d at 625-26 & n.2.
58. *Id.* at 651, 234 P.2d at 629.
59. *Id.*
60. *Id.* at 653, 234 P.2d at 630 (Carter, J., dissenting).
61. See statutory proposal following note 155 *infra.*
62. CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶2(b). With one exception, discussed at note 72 *infra*, policy coverage continues only "so long as such insured retains an estate or interest in the land . . . ." CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶2(b).
63. The common law or English covenants of title are discussed at a later point. See text accompanying notes 131-148 *infra.*

cases of a California grantor assigning his policy to his grantee. Although it is established that some types of indemnity insurance cannot be assigned prior to a loss without the consent of the insurer, it is the author's contention that title insurance is a unique form of indemnity insurance, and that therefore assignments of title policies should be enforceable in favor of the named insured's grantee.

The traditional justification for the rule that assignments of certain types of policies are not enforceable has usually been articulated in cases involving casualty insurance.[64] In such instances, the rule is obviously defensible because the insurer selects the insured as an acceptable risk, with some discrimination, considering the care which the latter is likely to exhibit over the insured property. The risk assumed by the casualty insurer would be beyond its control if its policies were assignable without its consent, for it would then lose the opportunity of selecting its insured. This consideration, however, is absent in the context of title insurance since the risk of the title insurer is fixed at the writing of the policy. It is solely by virtue of claims existing at the time the policy is issued that the title insurer will ever suffer loss; and assignment of the policy will have no effect upon that risk. Furthermore, Section 520 of the Insurance Code voids policy provisions which purport to preclude the assignment of any claim against an insurer by an insured where a loss has already occurred.[65] Thus, after a loss has been suffered, the insured under a fire policy may assign his right to collect under the policy.[66] This follows from the fact that the insurer's liability has been established before the assignment of the casualty policy. However, since there is no difference in the insurer's liability under a title policy between a pre-loss and a post-loss assignment, it would seem that the public policy underlying section 520 should dictate that a title policy provision denying policy rights to assignees be denied enforcement.[67] California has already statutorily validated assignments of life and disability policies,[68] and similar treatment should be accorded title policies since the assignment of a title policy has even less effect on the insurer's risk than the transfer of a life or disability policy.[69]

64. Bergson v. Builder's Ins. Co., 38 Cal. 541 (1869); Bibend v. Liverpool & London Fire & Life Ins. Co., 30 Cal. 79 (1866); Greco v. Oregon Mut. Fire Ins. Co., 191 Cal. App. 2d 674, 12 Cal. Rptr. 802 (1961). *See also* Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964).

65. "An agreement not to transfer the claim of the insured against the insurer after a loss has happened, is void if made before the loss except as otherwise provided . . . ." CAL. INS. CODE §520.

66. Gillis v. Sun Ins. Office, Ltd., 238 Cal. App. 2d 408, 47 Cal. Rptr. 868 (1965).

67. *Cf.* Cook v. Cook, 17 Cal. 2d 639, 111 P.2d 322 (1941) (discussing the public policy favoring assignments of life insurance policies).

68. *See* CAL. INS. CODE §10130.

69. Enforcement of assignments of life and disability policies may encourage the

The only possible defense of title policy provisions limiting coverage to the named insured and those who succeed to his interest by operation of law is that perhaps premium rates have been based upon the assumption that the provisions are enforceable. Even though it is difficult to ascertain the relationship between these provisions and the premium rates, the title companies themselves tacitly concede the impropriety of collecting multiple premiums for nearly identical risks, for they often charge reduced rates when a policy is written on a title which has previously been insured by the same insurer.[70] Further, for reasons discussed later,[71] it is doubtful whether enforcement of title policy assignments will reduce the number of policies written, and thus title insurers need not fear that such assignments will seriously diminish revenues. However, even if it can be demonstrated that the profits of title insurers would decline if policy assignments were enforceable, it would seem preferable from a public policy standpoint that their revenues decline, rather than have the companies profit as a result of forcing grantees to purchase policies covering risks previously assumed by the insurers.

Although the standard policy may preclude effective assignments, it does recognize that the insured may have rights upon the policy which survive his conveyance of the insured parcel to another. The insurer under such a policy agrees to indemnify the insured for any losses he sustains in an action by his successors upon any title convenant he has given his grantee if that covenant has been breached because of a defect covered in the policy.[72] In California, however, this provision of the policy is normally meaningless since in most transactions the grantor does not warrant the title against claims antedating his acquisition of title.[73] Therefore, since the insurer is answerable only for defects arising

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assignees to hasten the death or disability insured against in the policies, but it is difficult to conceive of a similar problem with regard to the assignment of title policies.

70. In limited circumstances, it is the current practice in California for title companies to recognize the equities of this argument by offering lower premiums when a policy is issued within a short period of time after the issuance of an earlier policy by the same company insuring the same title (*e.g.*, within two years of the writing of the existing policy).

71. See text preceding note 74 *infra.*

72. The coverage of this policy shall continue in force as of Date of Policy, in favor of an insured so long as such insured retains an estate or interest in the land, or owns an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶2(b).

73. See text accompanying notes 120-123 *infra.*

before title vested in the insured, there is little likelihood of recovery against the insurer because of the insured's liability on his title covenants. Yet, it seems paradoxical that the title companies purport to give this additional protection to the insured and at the same time prevent the insured from assigning the policy. Perhaps the title companies prefer that their insureds do indirectly what they are precluded by the policy from doing directly; that is, the companies would have their insureds give their grantees broader title covenants rather than merely assign their policies.

Of course, it is unlikely that a subsequent purchaser of previously insured property would be adequately insured by merely taking an assignment of his predecessor's title policy, since the value of the land will normally have appreciated in the interim. Even if assignments were permitted, a later purchaser should secure additional protection which reflects the difference between the face amount of the existing policy and his purchase price. Furthermore, new liens or encumbrances may have been imposed upon the land since the issuance of the existing policy, and therefore a purchaser should obtain an updated policy. Nevertheless, assignments should be recognized and provision should be made for reducing premiums where a policy is issued on land which has been previously insured by the same insurer to reflect the fact that some risks have already been examined and covered by the company.[74]

Until California grantors begin to assign their title policies to their grantees, the dearth of case law in this area will continue. Perhaps, in those few instances where grantees are represented by counsel, the attorneys should attempt to secure title policy assignments from grantors. On the other hand, it is arguable that the mere transfer of title should operate as an implied assignment of the grantor's policy. Such a result, however, appears to be precluded under Section 305 of the Insurance Code, which provides that the mere transfer of the insured subject matter does not transfer the insurance. For reasons already stated, it is difficult to conceive of policy reasons justifying the application of this rule to title insurance. In several other jurisdictions, courts deciding the rights of grantees under title covenants given by prior grantors have held that those covenants confer indirect benefits on the grantee even where the title covenants are not those which run with the land.[75] Thus, it has been held that where A gives B a covenant of seisin

74. *Cf.* note 70 *supra.*

75. *E.g.*, Brinton v. Johnson, 35 Ida. 656, 208 P. 1028 (1922); Schefield v. Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 97 (1871); Anderson v. Larson, 177 Minn. 606, 225 N.W. 902 (1929); Brunt v. McLaurin, 178 Miss. 86, 172 So. 309 (1937); Talbert v. Grist, 198 Mo. App. 492, 201 S.W. 906 (1918); Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927).

and B subsequently conveys the property to C, C can maintain an action against A for breach of the covenant of seisin. Although this covenant is broken at the time of the conveyance to B, B thereafter has a chose in action against A for breach, if any, on the covenant, which passes to C by implication.[76] While there may be no breach of the duties of a title insurer until an adverse claim has been asserted, there would seem to be no objection to treating a conveyance as an implied assignment of the grantor's title policy. True, the grantor's policy has not been converted into a chose in action, but as discussed previously,[77] there is also no increased exposure for the insurer in allowing the assignment before an actual loss. Therefore, statutory recognition of the enforceability of title policy assignments should be given in California. A proposed statute to this effect is found in the concluding section.[78]

D. Actions on Title Policies

The liability of a title insurer does not arise until such time as the insured has suffered loss or damage resulting from defects covered by the policy.[79] In order for the action to lie, there must be an ouster of the insured or the assertion of a superior or inconsistent title;[80] the mere existence of a paramount claim will not give rise to such an action.[81] Furthermore, the standard policy requires the insured to notify the insurer of any claim adverse to the title as insured.[82] Therefore, the

76. Iowa Loan & Trust Co. v. Fullen, 114 Mo. App. 633, 91 S.W. 58 (1905).
77. See text accompanying notes 64-65 *supra.*
78. See statutory proposal following note 156 *infra.*
79. The Standard Policy requires the insurer to indemnify the insured only for loss or damage, not exceeding the amount of insurance stated in the policy, and for costs, attorney's fees, and expenses of litigation carried on by the insured with the company's written authorization. CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶6(b).
80. Overholtzer v. N. Counties Ins. Co., 116 Cal. App. 2d 113, 127, 253 P.2d 116, 123 (1953); *see also* Hansen v. W. Title Ins. Co., 220 Cal. App. 2d 531, 33 Cal. Rptr. 668 (1963). Since title insurance is essentially indemnity insurance, it might be argued that a cause of action thereunder does not accrue until such time as the insured has been physically ousted or has suffered an adverse judgment divesting or curtailing his title. Under other kinds of indemnity policies, it has been held that the limitation period does not commence until a final judgment has been entered fixing the insured's loss. Case v. Sun Ins. Co., 83 Cal. 473, 23 P. 534 (1890); Sutherland v. Calif. Highways Indem. Exch., 88 Cal. App. 724, 264 P. 278 (1928). However, Section 339 of the Code of Civil Procedure makes it clear that it is the *discovery* of the loss or damage, not the damage of loss itself, which triggers the running of the statute in title insurance cases, and it has been held that the insured under such a policy discovers his loss not upon suffering an adverse judgment respecting his title, but upon learning that a suit concerning that title has been instituted. Hansen v. W. Title Ins. Co., 220 Cal. App. 2d 531, 538, 33 Cal. Rptr. 668, 672-73 (1963).
81. Overholtzer v. N. Counties Ins. Co., 116 Cal. App. 2d 113, 127, 253 P.2d 116, 123 (1953).
82. CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶3. However, breach of his obligations under this clause will not work a forfeiture of the insured's policy rights unless the insurer has been substantially prejudiced thereby. Moe v. Transamerica Title Ins. Co., 21 Cal. App. 3d 289, 301-02, 98 Cal. Rptr. 547, 555 (1971).

insured may forfeit his rights under the policy if he fails to advise the company of any known adverse claim. This provision of the policy, however, does not obligate the insured to locate potential adverse claims; he must only inform the company of those claims which are actually asserted, whether by the institution of suit or otherwise. Accordingly, title insurance differs from the present title convenants,[83] which give rise to a cause of action immediately upon their making. Likewise, the statute of limitations for actions on title policies does not commence running until discovery of actual loss or damage by the insured.[84] However, it is the date of actual discovery of the loss, not the date when discovery of the adverse interest would have been possible, which triggers the statute.[85] Yet, the mere assertion of a superior claim which is communicated to the insured constitutes "loss or damage" within the meaning of the statute.[86]

The liability of a title insurer, however, reaches beyond mere indemnification, for it is obligated to defend the insured's title whenever that title, as insured, is challenged in the courts.[87] Should the company fail to honor this latter obligation, it exposes itself to liability in excess of the policy limits. For example, in *Kapelus v. United Title Guaranty Co.*,[88] the insurer without justification refused to defend the insured's title in bankruptcy proceedings wherein the bankrupt claimed that the insured held only a mortgage in the land whereas the policy guaranteed that the fee was in the insured.[89] The court noted that the wrongful failure of a title company to represent the insured in the action assailing his title resulted in the company's liability for the costs and losses incurred by the insured in defending the action, even though the judgment rendered was predicated on theories not within the policy coverage.[90] Further, the insurer in such instances will be bound by the material findings of the trier-of-fact in the suit against the insured.[91] Therefore, if the suit results in a finding that the insured's title is inferior to that of the adverse claimant, that finding cannot be controverted by the title insurer in a subsequent action on the policy. Moreover, the initial judgment against

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83. These covenants are the covenant of seisin, the covenant of right to convey, and the covenant for further assurances. See text accompanying notes 131-136 *infra*.
84. CAL. CODE CIV. PROC. §339.
85. Hansen v. W. Title Ins. Co., 220 Cal. App. 2d 531, 538, 33 Cal. Rptr. 668, 672-73 (1963).
86. *See id.*
87. CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶3(a).
88. 15 Cal. App. 3d 648, 93 Cal. Rptr. 278 (1971).
89. *Id.* at 652, 93 Cal. Rptr. at 280.
90. *Id.* at 653, 93 Cal. Rptr. at 281.
91. *Id.* at 654, 93 Cal. Rptr. at 281, *citing* Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942).

the insured, or a good faith settlement made by the insured, raises a presumption that the insurer is liable on the policy.[92]

It is not always a simple task to determine when the company's duty to defend arises since actions against the insured do not always make it clear that the plaintiff's allegations raise issues relative the insured's title. For example, the complaint may allege only that the insured is encroaching on the plaintiff's land. However, it is the duty of the insurer to "defend its insured whenever it ascertains facts which [give] rise to the potential liability under the policy."[93] Hence, if the insured in such a case notifies the company of the suit and the company can reasonably deduce that the alleged encroachment has been occasioned by the insured's reliance on the description of his title on the policy, the company will be bound to defend the action.[94]

It seems that the present law providing that a cause of action on a title policy should not accrue until the insured discovers a paramount claim is appropriate. The insured, after all, has paid a premium in order to place the risk of future developments on the insurer. Due to the myriad fact patterns in which the issue of "discovery of actual loss or damage" may arise, and in view of the care with which the courts have guarded the interests of policyholders when the issue has been litigated,[95] it seems best to leave the resolution of questions relating to the accrual of actions on title policies to the courts.

E. Tort Liability of Title Insurers

Aside from its liability under a title policy, there remains the issue of a title company's liability as an abstractor. It is well established that title companies are answerable for their negligence in searching, examining, and reporting titles where they have expressly undertaken the duty to provide a title report.[96] This liability may be founded in tort for negli-

92. Hansen v. W. Title Ins. Co., 220 Cal. App. 2d 531, 537, 33 Cal. Rptr. 668, 672 (1963); Ritchie v. Anchor Cas. Co., 135 Cal. App. 2d 245, 250, 286 P.2d 1000, 1003 (1955).

93. Stearns v. Title Ins. & Trust Co., 18 Cal. App. 3d 162, 167, 95 Cal. Rptr. 682, 685 (1971), *quoting* Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276-77, 54 Cal. Rptr. 104, 112-13, 419 P.2d 168, 177 (1966). *See also* Overholtzer v. N. Counties Title Ins. Co., 116 Cal. App. 2d 113, 253 P.2d 116 (1953).

94. *See* Stearns v. Title Ins. & Trust Co., 18 Cal. App. 3d 162, 167, 95 Cal. Rptr. 682, 685 (1971).

95. *E.g.*, Nebo, Inc. v. Transamerica Title Ins. Co., 21 Cal. App. 3d 222, 98 Cal. Rptr. 237 (1971); Stearns v. Title Ins. & Trust Co., 18 Cal. App. 3d 162, 95 Cal. Rptr. 682 (1971); Kapelus v. United Title Guar. Co., 15 Cal. App. 3d 648, 93 Cal. Rptr. 278 (1971); Hansen v. W. Title Ins. Co., 220 Cal. App. 2d 531, 33 Cal. Rptr. 668 (1963).

96. *E.g.*, Hurdy v. Admiral Oil Co., 56 Cal. 2d 836, 366 P.2d 310, 16 Cal. Rptr. 894 (1961); Lattin v. Gillette, 95 Cal. 317, 30 P. 545 (1892); Viotti v. Giomi, 230 Cal. App. 2d 730, 41 Cal. Rptr. 345 (1964); Mitchell v. Cal.-Pac. Title Ins. Co., 79 Cal. App. 45, 248 P. 1035 (1926).

gent examination of the public records, or it may lie in contract for breach of the obligation to conduct the search in a prudent manner.[97] It may often be to the advantage of the insured to sue in tort since, in that event, he can avoid the contract measure of damages normally applied in actions on title policies and recover the full amount of any losses he has sustained because of his reliance on the policy description of title without regard to the policy limits.[98] The difficulty in most residential transactions, of course, is that the purchaser does not enter into a contract with the title company for an abstract but rather bargains only for an insurance policy. It remains an open question in California whether an insurer who has agreed to furnish only a preliminary title report[99] or a title policy owes the insured any obligation to describe accurately and completely the state of the title. The courts of other jurisdictions are divided on this issue.[100]

The trend of the recent California cases indicates that the insured may indeed be entitled to rely upon the title company's description of title in the policy and collect tort damages for losses occasioned in that reli-

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97. "Generally speaking, the abstractor's obligation is contractual, and his contract determines the scope and extent of his examination. He is liable for breach of his contract, and he may also be held liable on a negligence theory for failure to exercise skill and care." Hawkins v. Oakland Title Ins. & Guar. Co., 165 Cal. App. 2d 116, 123, 331 P.2d 742, 746 (1958), *quoting* 1 CAL. JUR. 2d, *Abstracts of Title*, §8, p. 206.

98. *See, e.g.*, Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975) (permitting recovery for emotional distress and suggesting that punitive damages may also be recoverable); Mitchell v. Calif.-Pac. Title Ins. Co., 79 Cal. App. 45, 248 P. 1035 (1926). *See also* Banville v. Schmidt, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974).

99. A preliminary title report is a statement by a title insurer to a prospective insured that the former will issue a policy insuring title as described in the report upon receipt of the appropriate premium and subject to such matters affecting title as might arise between the time the report is prepared and the time a policy is issued. Although a title insurer might argue that it assumes no responsibility for the accuracy of its title description in a preliminary report since it is only agreeing to issue a policy in the future in accord with the provisions of the report, it has been held that the presentation of the preliminary report is the equivalent of delivering a title abstract with its incumbent potential tort liabilities.

> [In presenting a buyer with a preliminary report] [t]he insurer serves as an abstractor of title—and must list *all* matters of public record regarding the subject property in its preliminary report . . . . The duty imposed upon an abstractor of title is a rigorous one: An abstractor of title is hired because of his professional skill, and when searching the public records on behalf of a client he must use the degree of care commensurate with that professional skill . . . . [T]he abstractor must report all matters which could affect his client's interests and which are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made.

Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 938-39, 122 Cal. Rptr. 470, 485 (1975).

100. *See, e.g.*, Quigby v. St. Paul Title Ins. & Trust Co., 60 Minn. 275, 62 N.W. 287 (1895) (tort recovery allowed); Booth v. New Jersey Highway Auth., 60 N.J. Super. 534, 159 A.2d 460 (1960) (no recovery in tort); Trenton Potteries Co. v. Title Guar. & Trust Co., 176 N.Y. 65, 68 N.E. 132 (1903) (tort recovery allowed); Maggio v. Abstract Title & Mortgage Corp., 277 App. Div. 940, 98 N.Y.S.2d 1011 (1950) (no recovery in tort).

ance.[101] In *J. H. Trisdale, Inc. v. Shasta County Title Co.*,[102] the plaintiff alleged that it had suffered loss as a result of its reliance upon a preliminary title report which had been negligently prepared by the defendant for the plaintiff's benefit and use. The trial court sustained demurrers to the complaint on the ground that the plaintiff had contributed to its own injury by failing to inspect the record upon receipt of the preliminary report.[103] On appeal the trial court was reversed, and although the appellate court's opinion is somewhat unsatisfactory in that it fails to distinguish adequately between the abstracting and insuring roles of a title company, it has been interpreted "as permitting a cause of action against a title insurer for negligence in searching records."[104]

In *Hawkins v. Oakland Title Insurance & Guarantee Co.*,[105] the plaintiff purchased a title policy and ten years later discovered a prior recorded deed not disclosed in the policy which allegedly affected his title adversely. In one of his causes of action against the insurer, plaintiff raised the issue of "whether or not, in California, one can sound in damages against the other contracting party for negligently searching the records as a preliminary to performing under the contract."[106] The court in *Hawkins* reviewed the prior California case law and, although it found defects in Hawkins' pleadings, indicated that such a cause of action could be stated.[107] Nevertheless, dictum in the opinion suggests that the mere undertaking by a title company to insure a title does not obligate the company to examine and report the title prudently for the reason that there could be no liability for a negligent search or report unless the company "undertook to search the title for their [*sic*] [the purchaser's] benefit, and negligently reported the results of the investigation incorrectly."[108] The court also observed that the defendant had made no express representations as to the true state of the title.[109] Since it was conceivable that the insurer would have insured against known

101. *See, e.g.*, Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975); Banville v. Schmidt, 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974); Northwestern Title Security Co. v. Flack, 6 Cal. App. 3d 134, 85 Cal. Rptr. 693 (1970); Murray v. Title Ins. & Trust Co., 250 Cal. App. 2d 248, 58 Cal. Rptr. 273 (1967); Colonial Sav. & Loan Ass'n v. Redwood Empire Title Co., 236 Cal. App. 2d 186, 46 Cal. Rptr. 16 (1965); Hall v. San Jose Abstract & Title Ins. Co., 172 Cal. App. 2d 421, 342 P.2d 362 (1959); Hawkins v. Oakland Title Ins. & Guar. Co., 165 Cal. App. 2d 116, 331 P.2d 742 (1958); J.H. Trisdale, Inc. v. Shasta County Title Co., 146 Cal. App. 2d 831, 304 P.2d 693, 81 P.2d 578 (1956).

102. 146 Cal. App. 2d 831, 304 P.2d 832 (1956).

103. *Id.* at 833-34, 304 P.2d at 833.

104. Banville v. Schmidt, 37 Cal. App. 3d 92, 104, 112 Cal. Rptr. 126, 133 (1974).

105. 165 Cal. App. 2d 116, 331 P.2d 742 (1958).

106. *Id.* at 123, 331 P.2d at 746.

107. *Id.* at 127, 331 P.2d at 748.

108. *Id.* at 127, 331 P.2d at 748.

109. *Id.* at 127, 331 P.2d at 748.

risks not disclosed in the policy, the court likewise refused to characterize the policy description as an implied representation of the state of the title.[110]

In 1974 the Third District Court of Appeal re-examined the question of a title company's tort liability in *Banville v. Schmidt*.[111] In that case the plaintiffs alleged that they had purchased a title policy from the defendant showing title in the Fullmers with a deed of trust outstanding which had been assigned to the plaintiffs. In fact, however, at the time the policy was written, the Fullmers had deeded the property to the beneficiaries under the deed of trust and had thereby extinguished the obligation secured by that deed.[112] Plaintiffs charged that the title company negligently failed to discover the deed to the beneficiaries. The title company defended by arguing that it had only undertaken to insure the title and owed the insured no duty to search the title since it had never agreed to do so for the benefit of the plaintiffs, characterizing its role as that of an insurer only, not as that of an abstractor.[113] Relying upon Section 552 of the Restatement of Torts,[114] the court minimized the distinction between the insuring and abstracting functions of the defendant and concluded that an insured may sue in tort where he has reasonably relied upon information supplied for the guidance of the insured by a title company in the course of its business.[115] Further, the court was not impressed by the suggestion in *Hawkins* that title insurers may knowingly insure against known defects: "In the light of modern real estate and title insurance practices, as well as under the authorities we have reviewed, an incorrect statement as to the vesting of title is hardly . . . 'something which the insurance company in the conduct of its business and in its best judgment' would see fit to make."[116] Unfortunately, the holding of *Banville* is somewhat equivocal since the insurer in that case had billed the insured not only for an insurance premium, but

110. *Id.* at 127, 331 P.2d at 748.
111. 37 Cal. App. 3d 92, 112 Cal. Rptr. 126 (1974).
112. *Id.* at 97, 112 Cal. Rptr. at 129.
113. *Id.* at 102, 112 Cal. Rptr. at 132.
114. One who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and (b) the harm is suffered (i) by the person or one of the class of persons for whose guidance the information was supplied, and (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

RESTATEMENT OF TORTS §552. For a discussion of the rights of third parties under title policies and binders, *see* McMahon, *Title Searches: Tort Liability in California*, 7 SANTA CLARA LAWYER 257 (1967).
115. 37 Cal. App. 3d at 104-05, 112 Cal. Rptr. at 134.
116. *Id.* at 92, 104-05, 112 Cal. Rptr. 126, 134 (1974).

for "Title Search, Examination, and Title Insurance."[117] In view of this fact, it may be argued that the case is consistent with earlier holdings that an insurer has no duty to search and report the title unless it has expressly assumed that responsibility.[118]

It is submitted that the typical purchaser of title insurance reasonably assumes that his policy accurately reflects the state of his title. Title companies should anticipate that insureds customarily rely upon the policy's description of the title and thus should be liable in tort when such reliance causes injury to the policyholder. Such a rule is especially needed in California where title companies hold a virtual monopoly on the title abstracting business and where the general public has come to rely upon these companies for accurate reports of the state of title. It frustrates the expectations of the typical insured to perpetuate the distinction between title insurance and title abstracting. It is believed that the legislature should act to remove any doubts which may exist in California as to the current state of the law in this regard, and to this end a proposed statute imposing such tort liability on title insurers will be found in the concluding section of this article.[119]

Title Insurance and Title Covenants Compared

In several respects, a grantee has less protection of his title under a title policy than under the common law covenants of title. This is not to say, however, that a vendee of land should not purchase title insurance and instead rely wholly upon whatever title convenants he extracts from his grantor or can enforce against his grantor' predecessors. Obviously, title insurance frequently provides greater protection to the grantee than these older devices if for no other reason than that title companies possess the financial resources to cover the grantee's losses—resources which a covenantor-grantor may not possess. Additionally, it may prove difficult for the covenantee to obtain personal jurisdiction over the covenantor when the former seeks to bring an action on the covenant whereas it is less likely this obstacle will prevent recourse against the title company. These considerations alone dictate that title insurance should

117. *Id.* at 105, 112 Cal. Rptr. at 134 (emphasis deleted). This is a common provision in the CLTA Standard Policy. *See* CLTA Standard Policy, *supra* note 2, Conditions and Stipulations, ¶13.

Banville has recently been followed in another case where the court, without considering the significance of this policy language, relied on *Banville* in concluding that "a title insurer is liable for his negligent failure to list recorded encumbrances in preliminary title reports." Jarchow v. Transamerica Title Ins. Co., 48 Cal. App. 3d 917, 939, 122 Cal. Rptr. 470, 485 (1975).

118. *See* Sala v. Security Title Ins. & Guar. Co., 27 Cal. App. 2d 693, 81 P.2d 578 (1938).

119. See statutory proposal following note 157 *infra.*

continue as a normal method of title assurance. However, because of the several inadequacies of title insurance, it is submitted that the use of the common law or English convenants of title should be revived in California to augment title insurance.

A. The California Grant Deed

Over the years the California legal and real estate communities have succumbed to the easy habit of employing the statutory form of "grant deed,"[120] which falls far short of giving to the purchasers the valuable protections of the common law covenants of title. Although California law permits the inclusion of the English covenants in any deed,[121] a search of any recorder's office will disclose few deeds wherein the grantor gives anything beyond the limited covenants implied in a grant deed.

These covenants are merely that the grantor has not conveyed away the estate described in the deed or any interest therein and that he or any person claiming through him has not encumbered the property.[122] Thus, under a grant deed, the grantor warrants only that the title has not been impaired by his own act or that of his successor; he does not warrant the legitimacy of the title itself. Indeed, the grantor may not even breach these implied warranties by purporting to convey a title which he has never owned, for so long as he or his successors have not conveyed to another or encumbered this nonexistent title, there would be no breach of the implied covenants. By comparison, the common law covenants, which are customarily given in deeds executed in many American jurisdictions, guarantee the title itself and not merely the previous acts of the grantor and his successors.[123]

The grant deed was first recognized statutorily in 1855[124] as a vehicle implying the special warranties described above. This 1855 statute now appears in Section 1113 of the Civil Code in substantially the same form. Unfortunately, the policy considerations which led to California's adoption of the statutory grant deed are now lost. Perhaps the statute traces its genesis to an English statute enacted in 1707, which provided that certain title covenants were implicit in a deed containing the words "grant, bargain and sell."[125] In 1850 the legislature mandated that the

120. A grant deed is one which contains no covenants of title beyond those implied by use of the word "grant" in the deed. CAL. CIV. CODE §1113.
121. *See* CAL. CIV. CODE §§1460-1470.
122. CAL. CIV. CODE §1113.
123. R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶¶904-911 at 1034-43 (abr. ed. 1968) [hereinafter cited as POWELL].
124. *See* CAL. STATS. 1855, c. 140, §9 at 172.
125. In 1707 it was enacted in England that some covenants of seisin, freedom from

common law of England should be the rule of decision in California,[126] and it has been held by the California Supreme Court that the common law includes not only the English *lex non scripta*, but also statutes enacted by the English Parliament.[127] Thus, it would appear immaterial whether the common law is limited to such English laws as had evolved prior to the American Revolution, or whether it includes such laws as were existent at the time of California statehood; in either case the English statute of 1707 would be included within the common law.[128] Regrettably, one can only speculate upon the motives of the 1855 legislature in creating the statutory grant deed.[129] Whatever its origins, however, it survived the 1872 revision of the Civil Code[130] and is today the customary vehicle for conveying real property.

B. The English Covenants of Title

The covenants implied in a California grant deed warrant only the prior conduct of the grantor and his successors; however, the common law title covenants warrant the title *per se*. Three such common law

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incumbrances, quiet enjoyment, and further assurances would be implied in a deed of bargain and sale containing the words "grant, bargain and sale." 6 Anne, c. 35, §30 (1707); see also POWELL, *supra* note 123, ¶904 at 1035-36.

126. JOURNAL OF THE CALIFORNIA LEGISLATURE, p. 823, 1123, 1204 (1850 Reg. Sess.); *see* CAL. CIV. CODE §22.2.

127. Moore v. Purse Seine Net, 18 Cal. 2d 835, 838, 118 P.2d 1, 4, *aff'd*, 318 U.S. 133 (1941), *reh. denied*, 318 U.S. 801 (1941).

128. *See id. Cf.* People v. Richardson, 138 Cal. App. 404, 32 P.2d 433 (1934).

129. Although the 1855 California Legislature had the benefit of the New York Field Code of 1848 and drew much inspiration from that code in other matters, it chose not to adopt the Field Code provision respecting title covenants. Section 489 of the Field Code provided that: "No covenant is implied in any grant of an estate in real property, whether it contains express covenants or not, except as provided by the Title on Hiring."

130. During the famous revision of the Civil Code of California in 1872, an attempt was made to revise the law of title covenants. Although this effort proved unsuccessful, it does provide some insight into the intent of the legislature if only to illustrate what that body did not intend. This proposal envisioned a Civil Code which accepted as its basic premise the provision of the New York Field Code that there be no implied covenants of title. In fact, it was proposed that California adopt verbatim the section of the New York Field Code quoted in footnote 129, *supra*. The proposal would also have recognized two types of "code covenants" in addition to the common law title covenants: "special code covenants" and "general code covenants." The special code covenants would have been nearly identical to those implied in a grant deed: (1) against prior grants made by the grantor; and, (2) against encumbrances imposed or suffered by the grantor. The general code covenants would have been more extensive and would have included a covenant against all encumbrances and a covenant of ownership. By the latter covenant, the grantor would warrant that he owned the property conveyed in fee simple, that he had peaceable possession thereof, that he had a perfect record title, and that he would pay all damages resulting from any breach of the covenant. None of these code covenants would run automatically with the land, although they could be assigned by a covenantee to his grantee. By rejecting this proposal, it would seem that the legislature was impressed with the simplicity of the grant deed and, while it did not abolish the common law covenants, saw no reason to imply any more encompassing covenants in a grant deed than had been provided for in 1855. [The author wishes to thank Mr. Thomas F. Mullen for discovering the bill which made these proposals among the unindexed tomes of the California State Law Library in Sacramento].

covenants are the covenant of seisin, the covenant of right to convey, and the covenant against encumbrances. By a covenant of seisin, the grantor warrants that he has lawful seisin of the premises described in his deed; that is, he guarantees that he is the owner of the estate he purports to convey.[131] Clearly, this covenant is broader than the covenants implied in a grant deed that the grantor has not previously disposed of the estate or any part thereof, since it further warrants that the title is free of defects antedating the covenantor's acquisition of title. The covenant of right to convey is almost identical with the covenant of seisin in that it guarantees that the grantor has the legal right to make the conveyance.[132] However, there may be occasions where the grantor lacks the power, or at least the right, to convey (*e.g.*, he may have conferred this right upon a real estate broker), and hence the necessity for this independent covenant. This grantor's covenant against encumbrances warrants that there are no liens, judgments, mortgages, or other encumbrances against the property.[133] This covenant also offers greater protection to the grantee than the implied covenant in a grant deed that the grantor and his successors have not themselves encumbered the property, for it reaches all encumbrances regardless of who caused them to be attached to the land.

These common law covenants are broken, if at all, when made, and accordingly do not run with the land for the benefit of successors in interest of the covenantee.[134] Further, the statute of limitations governing actions on these covenants begins to run at the time they are given, not upon the covenantee's discovery of loss or damage, and thus protection thereunder may be less long-lived than under a title policy.[135] Since they are breached, if at all, when made, these covenants are sometimes referred to as "present covenants."[136]

At common law choses in action were not assignable;[137] however, they are assignable today.[138] Nevertheless, the grantee of the covenantee does not succeed to any existing chose in action merely by accepting the

131. POWELL, *supra* note 123, ¶905 at 1035-36.
132. *Id.* ¶906 at 1037.
133. *Id.* ¶907 at 1038-39. It should also be noted that under Civil Code Section 1114, the term "incumbrance" includes "taxes, assessments, and all liens upon real property."
134. Woodward v. Brown, 119 Cal. 283, 294, 51 P. 2, 5 (1897); Salmon v. Vallejo, 41 Cal. 481, 484 (1871); Lawrence v. Montgomery, 37 Cal. 183, 188 (1869); Babb v. Weemer, 225 Cal. App. 2d 546, 550, 37 Cal. Rptr. 533, 535 (1964).
135. See text accompanying notes 79-86 *supra*.
136. A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 774-75 (2d ed. 1969) [hereinafter cited as CASNER & LEACH].
137. *See* Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605, 606 (1926); Dibble v. San Joaquin Light & Power Corp., 47 Cal. App. 112, 117, 190 P. 198, 200 (1920).
138. *See* CAL. CIV. CODE §954.

covenantee's deed; an express assignment is needed to transfer the claim.[139] However, these covenants, if properly assigned, can create rights in the successors of the covenantee whereas, as title policies are now written, no benefits generally are available on the policies to the insured's grantee's.[140] Several courts outside California, while accepting the general rule that these covenants are broken, if at all, when made, and thereafter create a chose in action in favor of the covenantee, have held that a subsequent deed from the covenantee operates as an assignment of the chose in action.[141] On the other hand, no California case has allowed the covenantee's grantee to sue on the covenants without an express assignment of the chose in action. It seems highly desirable that the covenantee's deed should work as an assignment of any rights he may have against his grantor for breach of these covenants since any interest the covenantee has in a guaranteed title is subordinate to that of his grantee. Additionally, the historical justification for the contrary rule disappeared when California recognized the assignability of choses in action.[142] Thus, a proposed statute to this desired end will be found in the concluding section.[143]

In addition to the three present covenants, there are two other English covenants frequently given in other states. The first of these, the covenant of quiet enjoyment and of general warranty, assures the grantee that he will not be dispossessed or disturbed by a paramount title.[144] An actual or constructive eviction under a superior title gives rise to an action for breach of this covenant. Moreover, the mere assertion of such a right to evict, if valid, will also give rise to a cause of action.[145] The other of these covenants is that for further assurances, by which the grantor agrees that he will perform all acts within his power to remove any defects in the title which existed at the time of his conveyance to the grantee.[146] Both of these covenants run with the land so as to benefit

139. Comment, *Covenants of Title Running With the Land in California*, 49 CAL. L. REV. 931, 933 (1961).

140. See text accompanying notes 62-63 *supra*.

141. See text accompanying notes 75-76 *supra*.

142. *See* CAL. CIV. CODE §954 (enacted in 1872).

143. See statutory proposals following note 158 *infra*.

144. POWELL, *supra* note 123, ¶¶908-909 at 1039-41. Technically, there are two distinct common law covenants: the covenant of quiet enjoyment and the covenant of general warranty. By the latter, the covenantor agrees to compensate the covenantee for any losses caused by a failure of title because of the assertion of a superior title by a third party. Tropico Land & Improvement Co. v. Lambourn, 170 Cal. 33, 38, 148 P. 206, 208 (1915). By a covenant of quiet enjoyment, the covenantor warrants that the covenantee will not be disturbed because of the failure of his title. For practical purposes, these covenants are "identical in scope and operation." POWELL, *supra* note 123, ¶909 at 1041. Therefore they are treated herein as one covenant.

145. Platner v. Vincent, 187 Cal. 443, 202 P. 655 (1921); McGary v. Hastings, 39 Cal. 360 (1870).

146. POWELL, *supra* note 123, ¶910 at 1041.

grantees of the covenantee,[147] and since the statute of limitations for actions on them does not necessarily commence at the time they are made, they are frequently described as "future covenants."[148] Thus, if the covenantee's grantee is ousted under a paramount title extant at the time of the making of the covenant, he will have a cause of action on the covenant against the covenantor.[149]

Since the common law covenants of title reach all defects and are not subject to the many exceptions contained in the standard title policy limiting the insurer's liability, purchasers of residential property should be encouraged to demand the common law covenants from their sellers. This would provide covenantees with the possibility of recourse against their sellers for any title defects not covered in their title policies. If this practice were followed, and absent an assignment of the policy, a grantor-covenantor who has breached his title covenant would frequently succeed in recouping at least some of his losses from his own title insurer, for, as has been mentioned, the standard title policy obligates the insurer to indemnify the insured for any losses he sustains in breaching a title covenant given his successors by reason of a defect covered by his policy.[150]

Perhaps one way to accomplish this goal of providing additional protection to the grantee would be to expand the covenants implied in the statutory grant deed to include the future English covenants. Such a reform would also augment the title assurance of remote grantees since, unlike the future covenants, those presently implied in the grant deed do not run with the land.[151] A suggestion to achieve that end statutorily will be found in the next section.[152]

STATUTORY PROPOSALS

As noted throughout this article, the author has drafted several proposed statutes which, if enacted, he believes would cure the deficien-

147. CAL. CIV. CODE §1463.
148. CASNER & LEACH, *supra* note 136, at 775.
149. CASNER & LEACH, *supra* note 136, at 775-76. Yet, if a future covenant is broken before the covenantee transfers his interest to a third party, the covenant is transformed into a chose in action which, though assignable, does not automatically pass to the transferee. *Id.* Absent an assignment of the chose in action, the transferee has no more rights than he would have if the covenantor had given only a present covenant. *See* CAL. CIV. CODE §954.
150. See text accompanying note 72 *supra.*
151. Notwithstanding the use of the words "his assigns" in Civil Code Section 1113, which provides for the statutory grant deed, it has been held that the implied covenant against encumbrances, as distinguished from conveyances, does not run with the land. McPike v. Heaton, 131 Cal. 109, 111, 63 P. 179, 180 (1900); Babb v. Weemer, 225 Cal. App. 2d 546, 551-52, 37 Cal. Rptr. 553, 536 (1964).
152. See statutory proposals following note 158 *infra.*

cies which he perceives in the present methods of title assurance in California. As with most attempts to formulate statutory solutions to complex or technical problems, there are undoubtedly imperfections in these suggestions. Nevertheless, it is hoped that these recommendations, either in their present form or in some modified form, will be enacted by the California Legislature and will serve to enhance the degree of title assurance customarily afforded purchasers of residential real property.

The first statutory proposal is intended to require title companies insure not only against matters of record which are not excepted to in the policy, but also against matters actually or constructively known to them and which are not discoverable in the official records or excepted to in the policy:[153]

> Wherever in a policy of title insurance, or in a title insurance binder, or in a preliminary title report issued by one in the business of issuing title insurance, there appears language limiting the liability of the issuer of such policy, binder, or report to compensate the insured or purchaser thereof for such losses as the insured or purchaser might suffer as the result of the record title to the property described in the policy, binder, or report being other than as described therein, "record," or any word or words of like import, shall be deemed to include all matters within the actual or constructive knowledge of the issuer, including but not limited to matters affecting title which are reasonably discoverable within the files and records of the issuer.

The following statute, if enacted, would insure that purchasers of title policies be given an opportunity to acquaint themselves with the distinction between standard and extended title coverage and to select which type of coverage they desire:[154]

> Before issuing an owner's or mortgagor's policy of insurance insuring title to real property situate in this State, an issuer shall inform the purchaser thereof of the distinction between standard and extended coverage and whether and upon what conditions extended coverage is available from the issuer, and shall obtain a written statement from the purchaser that the provisions of this section have been satisfied. If an issuer issues a standard owner's or mortgagor's policy without complying with the provisions of this section, the standard policy so issued shall be deemed to be a policy of extended coverage in a face amount equal to the price paid by the beneficiary thereunder in purchasing the property described in the policy or to the value of said property at the time the policy is issued, whichever is greater.

153. See text accompanying notes 13-16 *supra.*
154. See text accompanying notes 17-45 *supra.*

Since the typical purchaser of title insurance seldom distinguishes the marketability of title form the marketability of land, the law should give effect to his reasonable expectation that both are insured.[155] The following proposal should accomplish that end:

> Whenever in a policy of title insurance, the "marketability" of the title described therein is insured, the "marketability" of the land to which the title relates, as well as the title, shall be deemed insured.

Because there are no legitimate reasons to preclude the assignment of title policies, a statute making them assignable is suggested below.[156] However, a proviso has been added to preclude the assignee from collecting both upon the policy and upon any title covenants given him by his assignor for identical losses. This proposal would also allow the parties to agree that the mere transfer of title would not effect an assignment of the policy so that the grantor would be able in some instances to retain ownership of the policy and thus be entitled to indemnification by the insurer in the event that he is found liable upon any title covenants he has given:

> Any conveyance by an insured under a title insurance policy shall, notwithstanding any provisions in the policy to the contrary, constitute an assignment to the conveyee of the policy, which assignment shall be binding on the insurer; provided that the insured and his conveyee may agree in writing that the conveyance shall constitute no such assignment, and provided further that if the conveyee shall have any claims against his grantor upon any covenants of title given him by the latter with respect to the title insured upon the policy, the conveyee shall offset against his claim or claims upon such covenant or covenants any and all amounts to which he is entitled under the policy.

The following proposal would expose title insurers to tort liability for negligent misrepresentations of the state of title and thereby recognize that title insurers in California have assumed the role of title abstractors as well as insurers:[157]

> There is implicit in every policy of title insurance and in every preliminary report on title and in every title policy binder respecting title to real property situate in this State a covenant on the part of the issuer thereof that the issuer will indemnify the beneficiary of the policy, or purchaser of the report or binder, for any and all losses which the beneficiary or purchaser might incur as the result

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155. See text accompanying notes 56-61 *supra.*
156. See text accompanying notes 62-78 *supra.*
157. See text accompanying notes 96-119 *supra.*

> of his reasonable reliance on the description of title in the policy, report, or binder in all cases where that description is inaccurate, incomplete or otherwise erroneous because of the negligence of the issuer in examining or reporting the state of the title. This covenant shall be deemed a part of every such policy, report, or binder by operation of law, and any provision in such policy, report, or binder which is inconsistent with the implication of such a covenant shall be void and of no effect.

Two of the major theses of this article are that common law methods of title assurance should be revived in California and that remote grantees ought to receive the benefit of such covenants.[158] The following two proposals are designed to incorporate into the statutory grant deed the future English covenants, which the author believes are adequate for most purposes, and to increase the rights of remote grantees under the present English covenants:

> All covenants of title with respect to real property situate in this State shall run with the land unless there is express language in the covenants to the contrary.
>
> From the use of the word "grant" in any conveyance by which an estate of inheritance or fee-simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:
>
> 1. That the grantee, his assigns and heirs, shall have quiet and peaceable enjoyment and possession of the estate described in the conveyance, and that the grantor shall warrant and defend the grantee, his assigns and heirs, against the lawful claims of all persons to said estate or any part thereof.
>
> 2. That the grantor shall do, execute, or cause to be done or executed all such further acts, deeds, or things for the better, more perfectly, and absolutely conveying and assuring the estate described in the conveyance to the grantee, his assigns and heirs, as the grantees, his assigns and heirs, may reasonably request.

This last proposed statute is designed to achieve two purposes: to entitle remote grantees to the benefits of the implied title covenants and to encourage the use of the future title covenants in California. The present English covenants have not been included in this statute because in most instances the future covenants will provide sufficient title assurance, and because inclusion of the present covenants might make it difficult for the statutory proposal to win acceptance in view of the fact that these latter covenants may expose the covenantor to liability in instances where

158. See text accompanying notes 131-152 *supra*.

there has been no assertion of an adverse claim (for example, instances where the owner of the adverse claim has not asserted it).[159]

CONCLUSION

Title insurance is far from a meaningless method of title assurance, for it provides the insured with protection against nearly all recorded defects and many off-record defects. Additionally, it creates a "deep pocket" from which the insured may recoup losses which he suffers because of paramount claims. Nevertheless, these advantages can be improved by implementing the changes in the law outlined above and by drawing upon the common law vehicles of assuring title, which have long been neglected in California. Perhaps the reforms suggested in this article will have no appreciable impact upon the number of recoveries against title insurance companies in California. Yet, in this state, where title insurers hold a near monopoly on the title assurance business, and where the typical home buyer has little recourse except against his title insurer, it would not seem to impose an undue burden upon the insurers to enact the statutory measures proposed herein and encourage sellers of land to give greater guarantees of title than is now the practice. In view of the comparatively short limitation period for acquiring title by adverse possession in California, these recommendations are unlikely to impose unreasonably long periods of exposure to liability upon either insurers or grantors.[160]

159. *See generally* POWELL, *supra* note 123, ¶¶905-907 at 1036-39.

160. The general statutory period for perfecting title by adverse possession in California is five years. CAL. CODE CIV. PROC. §318; CAL. CIV. CODE §1007. Of course, not all adverse claims are barred by the passage of the requisite statutory period, *e.g.*, the claim of a remainderman whose right to possession has not yet vested. *See* Woman's Home and Foreign Missionary Soc'y of the Presbytery of Los Angeles v. Bank of Am. Nat'l Trust and Savings Ass'n, 15 Cal. App. 2d 682, 59 P.2d 1060 (1936).